No. 15276-77

United States Court of Appeals
For the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL and PACIFIC RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, GREAT NORTHERN RAILWAY COMPANY and NORTHERN PACIFIC RAILWAY COMPANY, *Appellants,*

vs.

ALOUETTE PEAT PRODUCTS, LTD., *et al.*, *Appellees.*

INTERSTATE COMMERCE COMMISSION, *Appellant,*

vs.

ALOUETTE PEAT PRODUCTS, LTD., *et al.*, *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

BRIEF OF RAILROAD APPELLANTS

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BRIEF OF RAILROAD APPELLANTS

I. STATEMENT ON JURISDICTION

The complaints (T. 3-44 incl., and 45-49 incl.)[1] invoked the jurisdiction of the United States District Court to set aside and annul orders of the Interstate Commerce Commission (hereinafter called "Commission") entered in proceedings instituted before the Commission under Title 49 U.S.C.A. Sec. 9, for the recovery of damages alleged to have been sustained by

[1]References to the printed transcript of record will be shown by the abbreviated "T." followed by the page at which the material referred to appears in the record.

the collection of railroad freight charges. The Commission's orders denied recovery and dismissed the complaints (T. 388-389).

A United States District Court composed of one judge under Title 28 U.S.C.A. Sec. 1336 (28 U.S.C. Sec. 41(28)) has jurisdiction to review an order of the Commission denying damages in proceedings before the Commission under Title 49 U.S.C.A. Sec. 9, and appeal from the judgment of the United States District Court is to the United States Court of Appeals. *United States v. Interstate Commerce Commission,* 337 U.S. 426, 93 L.ed. 1451; *United States v. Interstate Commerce Commission,* 98 F.(2d) 958.

II. STATEMENT OF THE CASE

This is an appeal from a judgment reversing orders of the Interstate Commerce Commission dismissing complaints seeking reparations of freight charges for the transportation of peat from British Columbia points to destinations in the United States.

This case has its origin in April of 1946, when substantially all of the railroads in the United States filed with the Commission petitions for authority to increase their freight charges 25 per cent. These proceedings are reported in *Ex Parte 162, Increased Railway Rates, Fares, and Charges, 1946,* 264 I.C.C. 695; report on further hearing, 266 I.C.C. 537 (hereinafter called "Ex Parte 162").

In the Commission's report on further hearing, 266 I.C.C. at 614, the Commission allowed a general increase of 20 per cent in the freight charges of railroads, with many exceptions to be noted on the subsequent

pages, 615 to 623, inclusive. Annexed to this report was an appendix defining the manner in which the increases allowed by the report and order were to be applied and which contained the following opening paragraph:

> "Basic freight rates, whether class or commodity, and charges, on the commodities hereinafter specified, may be increased in the amounts and in the manner set forth as to each commodity class or group. The commodity group numbers (or commodity class numbers) used in this appendix, and throughout the entire report and order, for convenience, are those specified in the order of division 4 of November 22, 1927, *In the Matter of Freight Commodity Statistics,* which was in effect at the date of the submission herein, although a new list of commodity classes with articles assigned thereto has been promulgated by order of division 1, September 24 and October 16, 1946, to become effective January 1, 1947. They are intended generally to cover the items customarily included by the carriers in their reports to the Commission under each numbered description, as of the date for the submission." (266 I.C.C. 537 at 618, Finding of Fact No. V, T. 31, 32)

The commodities thereafter listed in the Appendix included at page 623 the following:

> "Fertilizers, N.O.S., including Potash — Group 640
>
> Diatomaceous or Infusorial Earth—Group 701
>
> Twenty per cent, subject to a maximum of 6 cents per 100 pounds, or $1.20 per net ton." (Finding of Fact No. V, T. 32)

The above mentioned commodity Group 640, "Fertilizers, N.O.S., including potash," includes peat, ground or

unground, the commodity here considered (Exhibit No. 5).[2]

The carriers, in publishing the increased rates authorized in that proceeding, published a 6-cent maximum increase in rates on peat only when that commodity was carried in the tariffs in the fertilizer group. In instances where separate commodity rates were published for peat, the full 20 per cent increase was published (T. 324, 259). The increased rates were published to become effective on January 1, 1947 (T. 258). Thereafter, on different dates, the carriers by what they consider to be their voluntary act and not because of any requirement of the Commission, by several publications applying to different destinations reduced their rates on peat to a maximum increase of 6 cents per 100 pounds, the last such publication being March 29, 1948 (T. 258, 259, 260).

The appellees filed complaints[3] with the Interstate Commerce Commission, seeking recovery of the charges they paid on peat shipments that exceeded the 6-cent maximum increase prescribed for fertilizers, N.O.S., in the Commission's order in Ex Parte 162 (T. 149). Division 2 of the Commission, by report and order dated April 7, 1950, reported in 277 I.C.C. 641 (T. 320

[2]References to Exhibits are the exhibits received by the Commission at the hearing in Docket 29974, *Acme Peat Products, Ltd., et al. v. The Akron, Canton & Youngstown Railroad Company, et al.*

[3]There were two proceedings before the Commission—*Acme Peat Products, Ltd., et al. v. The Akron, Canton & Youngstown Railroad Company, et al.*, Docket No. 29974, and *Alouette Peat Products, Ltd., v. The Atchison, Topeka and Santa Fe Railway Company, et al.*, Docket No. 30260. Since the two cases raised identical issues, both were submitted and decided on the record made in *Acme Peat Products, Ltd., et al., v. The Akron, Canton & Youngstown Railroad Company, et al.*, Docket No. 29974 (T. 5).

to 333, incl.), found that the assailed rates were applicable, that the railroads were not authorized by the Commission's order in Ex Parte 162 to increase the rates by 20 per cent, and that the appellees were entitled to damages in the amount of the difference between the rates increased by a maximum of 6 cents per 100 pounds and the 20 per cent increase which the carriers had applied, on the theory that the retention of any sums in excess of the 6-cent maximum increase found by the Division to be the only increase authorized, would unjustly enrich the carriers (T. 329, 330). The carriers were ordered to repay the appellees the amount of freight charges they had collected in excess of a maximum increase of 6 cents per 100 pounds increase in their rates(T.331).

The defendant carriers petitioned for reconsideration by the full Commission (T. 333, 354), which was denied January 7, 1952 (T. 354, 355). In February, 1954, the Commission on reconsideration in *F. W. Bolgiano & Co., Inc. v. Baltimore & O. R. Co.,* reported in 291 I.C.C. 659, a case that raised legal issues identical to the issues in this proceeding, rejected the doctrine of unjust enrichment first announced in this proceeding, *Acme Peat Products v. Akron, C. & Y. R. Co.,* 277 I.C.C. 641, and held that although the carriers may have published and filed unauthorized increases in their rates, a shipper is not entitled to recover damages unless this action of the carriers resulted in damages to the shipper by requiring payment of unreasonable charges.

In light of this change in circumstances, the defendant carriers on March 2, 1954, tendered a petition to

the Commission for leave to file a petition to reopen and reconsider the Commission's decisions in this case (T. 369, 370). Simultaneously with the filing of the petition, the carriers also tendered a petition to reopen the proceedings for reconsideration (T. 369, 377). By order dated June 21, 1954, the Commission granted the petition for leave to file a petition for reconsideration, and reopened the proceedings for reconsideration (T. 377, 378).

The Commission on reconsideration, by its report and order dated October 4, 1954 (T. 379, 389) found that the assailed rates were applicable (T. 381), that there was no evidence that supported a finding that the assailed rates were unreasonable (T. 386), that the assailed rates were not unjust, unreasonable or otherwise unlawful, and dismissed the complaints (T. 387, 388, 389).

On November 5, 1954, the appellees filed a petition for reconsideration of the orders dismissing the complaint (T. 389-406), which was denied by the Commission by order dated January 3, 1955 (T. 406).

On April 15, 1955, the appellees instituted proceedings in the United States District Court for the Western District of Washington, to annul and set aside the orders of the Commission dismissing the complaints in the above mentioned proceedings. The order in *Alouette Peat Products, Ltd. v. The Atchison, Topeka and Santa Fe Railway Company, et al.,* Docket No. 30260, was the subject of the complaint in Cause No. 3923 (T. 3 to 13, incl.), and the order in *Acme Peat Products, Ltd., et al., v. The Akron, Canton & Youngstown Railroad Company, et al.,* Docket No. 29974, was the subject of the

complaint in Cause No. 3924 before the United States District Court.

Inasmuch as the parties had stipulated in *Alouette Peat Products, Ltd. v. The Atchison, Topeka and Santa Fe Railway Company, et al.,* Docket No. 30260 (T. 5) that the complaint be submitted for decision and be decided on the record made in *Acme Peat Products, Ltd., et al. v. The Akron, Canton & Youngstown Railroad Company, et al.,* Docket No. 29974, it was stipulated in the United States District Court (T. 24-25) that Cause No. 3924 be consolidated with Cause No. 3923 into one action for trial in the District Court, and an order consolidating these causes was entered (T. 26, 27). The record before the Commission was received in evidence (T. 83), together with certain excerpts from the carriers' tariffs (T. 84); the court heard argument of counsel, and, having announced its oral decision, entered findings of fact and conclusions of law finding and concluding as follows:

1. That the tariffs which the carriers filed naming the 20 per cent increase in rates on peat were illegal and void, and the appellees are entitled to recover all sums of money exacted by the carriers under such tariffs in excess of the rates which were in effect immediately prior to the publication and filing of such tariffs (Findings of Fact Nos. V and VI, Conclusion of Law No. II, T. 31-35, incl.).

2. That by increasing their rates, the carriers damaged the appellees by causing a loss of markets (Finding of Fact No. VII, T. 33).

3. That the Commission by granting the second peti-

tion of the railroads for reconsideration violated its own rules, and as a result thereof denied the appellees due process (Conclusion of Law No. IV, T. 35).

The court entered judgment reversing the orders of the Commission, remanding the proceedings to the Commission for the purpose of making and entering a reparations order consistent with the findings of fact and conclusions of law made by the court (T. 39).

III. SPECIFICATIONS OF ERROR

I.

The District Court erred in finding and concluding that the railroads failed to comply with the Commission's order in Ex Parte 162, *Increased Railway Rates, Fares, and Charges, 1946*, 264 I.C.C. 695, 266 I.C.C. 537, when they published the rates here considered. (Findings of Fact Nos. V and VI, Conclusion of Law No. II, T. 31-35, incl.).

II.

The District Court erred in concluding that the tariffs which the railroads published, and which were accepted by and filed with the Commission, naming the rates here considered, were illegal, void, and inapplicable, and that the rates which were in effect immediately prior to the rates named in tariffs here considered were the rates which are applicable to the shipments here in question (Conclusion of Law No. II, T. 34-35).

III.

The District Court erred in finding and concluding that the increase in rates here considered damaged the appellees (Finding of Fact No. VII, T. 33).

IV.

The District Court erred in failing to sustain the Interstate Commerce Commission's conclusion that the appellees failed to establish any violation by the railroads of the Interstate Commerce Act or orders of the Interstate Commerce Commission, for which the appellees were entitled to damages.

V.

The District Court erred in concluding that the Interstate Commerce Commission violated its own rules and as a result thereof denied the appellees due process by granting a second petition of the railroads for reconsideration as more particularly set forth in its order of June 21, 1954 (Conclusion of Law No. IV, T. 35).

VI.

The District Court erred in concluding that the plaintiffs are entitled to judgment against the defendants, and each of them directing that the orders heretofore made by the Interstate Commerce Commission be reversed, and that these causes be remanded to the Interstate Commerce Commission for the fixing of the amount of reparations due the appellees, together with interest thereon, and the entry of a reparations order consistent with the findings of fact, conclusions of law and judgment herein entered (Conclusion of Law No. V, T. 36); and in entering judgment reversing the orders of the Commission here considered and remanding the proceedings to the Commission for the purpose of fixing the amount of reparations due the appellees and the entry of a reparation order consistent with the court's Findings of Fact and Conclusions of Law.

IV. SUMMARY OF RAIROADS' ARGUMENT

The railroads in their argument will show,

First, that all the Commission required in its order in Ex Parte 162 was that in applying the increases there authorized, the carriers were to generally apply the increases to commodities as listed for statistical purposes, and the carriers complied with this general directive in publishing their rates.

Second, that even if the carriers exceeded the authority granted by the Commission in Ex Parte 162, when they published and filed the rates here considered, the filed rates were the only rates applicable to the shipments in question.

Third, if the carriers exceeded the authority granted by the Commission in Ex Parte 162, the mere showing of this violation would not in and of itself afford a basis for the award of damages to shippers. That where violation of the Interstate Commerce Act, or an order of the Commission, is shown, shippers can only recover damages therefor upon a showing (which is lacking on this record), that they were damaged thereby.

Fourth, That the Commission's rules permit the filing of a second petition for reconsideration, "for good cause shown, and upon leave granted," and that good cause was shown and leave was granted for the filing of the railroads' second petition.

V. ARGUMENT

Specification of Error No. I:

> "The District Court erred in finding and concluding that the railroads failed to comply with the Commission's order in Ex Parte 162, *Increased Railway Rates, Fares, and Charges, 1946,* 264 I.C.C. 695, 266 I.C.C. 537, when they published the rates here considered. (Findings of Fact Nos. V and VI, Conclusion of Law No. II, T. 31-35, incl.)"

The railroads, in increasing their rates in pursuance to the Commission's order in Ex Parte 162, applied a 20 per cent increase with a maximum of 6 cents to the commodities grouped in their tariffs under the designation, "Fertilizers." When peat, the commodity here considered, was carried in the tariffs in the classification as "Fertilizers," the maximum of 6 cents was therefore applied. However, in those instances, such as the one here presented by shippers located in British Columbia, where in order to give peat a lower rate than generally applied to "Fertilizers," the carriers had removed peat from the fertilizer group in their tariffs and published rates applying only on "Peat," the carriers applied a full 20 per cent increase (T. 259, 260, 224, 380, 381). This publication by the carriers was not through inadvertence, but was the result of the carriers' interpretation of what the Commission intended by its order in Ex Parte 162 (T. 259, 260). Furthermore, when the carriers applied the 6-cent maximum to the peat rates, they considered this to be their own voluntary act, and was not accomplished because of any requirement of the Commission (T. 260).

What had the Commission required in its order in Ex Parte 162? The Examiner who heard the case for the Commission in his proposed report said this:

> "In view of the fact that Ex Parte 162 was a proceeding nation-wide in scope, involving every commodity transported by rail, the Commission could only set forth in general terms how the increases it allowed should be applied." (T. 312)

The report, including the appendix, covers some 88 pages in the printed volume (pages 537 to 623, inclusive). In order to give the carriers a guide as to its intention, the Commission annexed an appendix to its report and made reference to the classification of commodities for statistical purposes, and said this:

> "Basic freight rates, whether class or commodity, and charges, on the commodities hereinafter specified, may be increased in the amounts and in the manner set forth as to each commodity class or group. * * * They are intended *generally* to cover the items customarily included by the carriers in their reports to the Commission under each numbered description, * * * " (Emphasis supplied) (T. 323-324)

In the initial decision in the instant case, the Commission admits that all they did in Ex Parte 162 was to give a general indication of how the Commission intended the increases to be applied. The Commission there said this:

> "The Commission set forth in general terms how the general increases authorized December 5, 1946. should be applied." (T. 323)

Yet the Commission in its initial decision in this case (T. 321), and in the decision on reconsideration (T.

379), made no finding that the carriers had failed to generally apply the increases to the commodities as grouped in the statistical grouping. The substance of the Commission's finding in both of these decisions is that by the language employed by the Commission in its order in Ex Parte 162, there could be no exceptions to a strict adherence to the application of the increases to the commodities as listed in the statistical grouping. If, as the Commission later stated, it was their intention to permit no deviations from the statistical grouping, it would have been a simple matter for the Commission to have so required. All the Commission needed to have said was that the increases allowed by the order would be applied to the commodities as listed in the statistical grouping. The use of the phrase that the increases are intended generally to apply to the commodities as listed, implies that there would be exceptional situations that would require deviations from a strict adherence to this application. In *Sims v. Scheussler,* 5 Ga. 850, 64 S.E. 99, at 102, the court commented on the use of the word "generally" as follows:

> "In the absence of binding authority, therefore, to the contrary, we must believe that, by the use of the word 'generally' in the Code section, it was at least intended to provide for exceptions from the general rule * * *."

In *Kaname Tokaji v. State Board of Equalization,* 20 Cal. App.(2d) 612, 67 P.(2d) 1082, at 1085, the court said:

> "Indeed the wording of the treaty itself indicates such a purpose, for, although it is provided that the subjects of each shall have liberty in the territories of the other to carry on trade, such lib-

> erty is qualified by the further provision 'and *generally* to do anything incident to or necessary for trade upon the same terms as native citizens.' (Italics added.) In the absence of the word '*generally,*' the treaty rights would be without limitation. Obviously, then, the word '*generally*' must be interpreted to mean that the contracting parties contemplated possible exceptions. In other words, construing the word in connection with the context, it can only mean that an *approximate* application of the treaty terms was to be effected, as opposed to a *definite* and *unqualified* application."

When the Commission's order in Ex Parte 162 came down, the carriers were charged only with the duty of reasonably interpreting and applying that order. The carriers' interpretation that the Commission recognized and intended that where the carriers found exceptional circumstances, they were permitted to deviate from a strict adherence to the grouping of commodities for statistical purposes, is a reasonable interpretation of the Commission's language used in that order. This court should find that the carriers were authorized to publish the increase in rates here considered.

Specification of Error No. II:

> "The District Court erred in concluding that the tariffs which the railroads published, and which were accepted by and filed with the Commission, naming the rates here considered, were illegal, void, and inapplicable, and that the rates which were in effect immediately prior to the rates named in tariffs here considered were the rates which are applicable to the shipments here in question. (Conclusion of Law No. II, T. 34-35)"

The trial court, having found that the carriers had

not complied with the Commission's order in Ex Parte 162 when they increased their rates, then erroneously concluded that rates named in the filed tariffs never became effective.

It is not contended that the assailed rates were not published and filed with the Commission. The principal witness for the complainants at the hearing before the Commission acknowledged that the rates were filed and became effective January 1, 1947. He testified:

> "It was a nationwide, permanent increase. *It was incorporated in the rate structure at that time;* it was not temporary." (T. 198) (Emphasis supplied)

The contention of the appellees before the Commission and before the District Court was not that the tariffs naming the increase in rates were not published and filed with the Commission, but that these tariffs, even though published, accepted by and on file with the Commission, did not name the applicable rates.

The Commission in its initial decision and decision on reconsideration found that the tariffs became effective on January 1, 1947, since they were accepted by the Commission and were filed (T. 326, 381). In the initial decision the Commission said this:

> "Where tariffs are tendered to and accepted by the Commission, the rates therein become applicable, even though technically they should have been rejected upon tender." (Citing cases) (T. 326)

In the final decision the Commission said this:

> "As stated by the division in the prior report the complainant's contention that the assailed rates

were not applicable has no merit since a rate published in a tariff on file with the Commission does not become inapplicable by reason of the fact that it contravenes an order of the Commission or was published on short notice without authority." (T. 381)

If the requirement that tariffs must be filed is to mean anything, this has to be the rule. Any other rule would defeat the very purpose for requiring tariffs to be published and filed. Congress has required carriers to file their tariffs with the Commission to make certain that there will be but one rate that can be applied at any given moment of time. This is the only way preference and discriminations prohibited by the Act can be prevented. The filing of a tariff with the Commission is a physical thing, no different than the filing of a document with the Clerk of this Court. The tariff or document is filed, or it isn't filed. If the Commission accepts it and puts it on file, or if the Clerk accepts it and puts it on file, the document is on file. The tariffs here considered were accepted and were filed by the Commission.

The requirement of filing tariffs under the supervision of the Commission not only is for the purpose of requiring carriers to state publicly what rates they can charge at any given moment, but is required to enable shippers to ascertain what these rates are. Shippers not only are entitled to know what rates a carrier may charge, but are entitled to know what rates their competitors must pay.

The trial court's conclusion will permit collateral attacks to be made on tariffs which are on file and ac-

cepted by the Commission. The District Court has held that even though tariffs are accepted and filed with the Commission, the rates named therein can be made inapplicable by showing something that happened prior to the time the rates were accepted and filed.

Under the rule announced by the Commission, a shipper or a competitor can ascertain from the Commission what rates have been accepted and are on file. If the court adopts the rule here announced by the District Court, this inquiry by a shipper or competitor will not be sufficient. Not only will such a party have to ascertain what rates are on file to cover his particular commodity and movement, but he will have the further burden of ascertaining by a search of the Commission's records that the rate which the Commission certifies is on file came into being only upon a strict observance of all of the Commission's rules, prior orders, and regulations relating to tariff publication.

This ruling by the District Court, if it becomes the established law, will destroy the very purposes Congress had in mind in requiring the publication of rates in the first instance. The great purposes of the Interstate Commerce Act are to prevent discrimination and undue preferences in the carriage of freight by railroad. The means by which these purposes were to be accomplished is the requirement that rates had to be filed with the Commission so they would be uniformly applied to all shippers. *Texas & P. R. Co. v. Abilene Cotton Oil Co.,* 204 U.S. 426, 51 L.ed. 553; *Southern R. Co. v. Reid,* 222 U.S. 443, 56 L.ed. 263.

Rates on file with the Commission cannot be made in-

applicable by any failure of the carriers to otherwise comply with the Act. *Texas & P. R. Co. v. Cisco Oil Mill,* 204 U.S. 449, 51 L.ed. 562; *United States v. Miller,* 223 U.S. 599, 56 L.ed. 568.

If the Commission accepts and files a tariff, the rates named therein become the only applicable rates even though such rates were published in direct violation of an express requirement of the Interstate Commerce Act. *Davis v. Portland Seed Co.,* 264 U.S. 403, 68 L.ed. 762. In that case the court said at page 415:

> "Relying on Pennsylvania R.R. Co. v. International Coal Co., 230 U.S. 184, the Interstate Commerce Commission has definitely rejected respondent's theory by many opinions, and holds that while a charge prohibited by the long and short haul clause, § 4, may subject the carrier to prosecution by the Government it does not afford adequate basis for reparation where there is no other proof of pecuniary damage.* * * "

And see *Louisville & N. R. Co. v. St. Regis Paper Co.,* 102 F.Supp. 713; *United States Mexican Oil Corporation v. Pennsylvania R. Co.,* 20 F.(2d) 385.

Neither clerical errors nor failure of the carriers to comply with orders of the Commission will protect the carriers or prevent the filed rate from being applicable. *Chicago, I. & L. Ry. Co. v. International Milling Co.,* 43 F.(2d) 93, certiorari denied 282 U.S. 885, 75 L.ed. 781; *Beaumont, Sour Lake & Western Ry. Co.. v. Magnolia Provision Co. et al.,* 26 F.(2d) 72, certiorari denied 278 U.S. 620, 73 L.ed. 542.

The District Court's conclusion that rates filed with the Commission were inapplicable because of the man-

ner in which they were published, is erroneous and is unsupported by authority.

Specifications of Error Nos. III and IV:

> "The District Court erred in finding and concluding that the increase in rates here considered damaged the appellees. (Finding of Fact No. VII, T. 33)"

> "The District Court erred in failing to sustain the Interstate Commerce Commission's conclusion that the appellees failed to establish any violation by the railroads of the Interstate Commerce Act or orders of the Interstate Commerce Commission, for which the appellees were entitled to damages."

If it be assumed that the carriers violated the order of the Commission in Ex Parte 162 when they published the assailed rates, the Commission was correct in dismissing the complaints because the appellees failed to prove that they were damaged by this claimed unlawful act. The Supreme Court in *Pennsylvania R. Co. v. International Coal Min. Co.,* 230 U.S. 183, 57 L.ed. 1447, points out that shippers are not entitled to damages upon showing only a violation of the Interstate Commerce Act. The court said, at page 1452:

> "But, as said in Parsons v. Chicago & N.W. R. Co., 167 U.S. 460, 42 L.ed. 236, 17 Sup.Ct. Rep. 887, construing this section (8), 'before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.' Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what, though called damages, would really be a penalty, in addition to the penalty payable to the government."

The doctrine of unjust enrichment adopted by the Commission in the initial decision in this proceeding was rejected by the Supreme Court in *Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co.,* 269 U.S. 217, 70 L.ed. 242:

> "The liability in the case at bar arises out of the wrongful exactment from the shipper, not out of the unlawful receipt or unjust enrichment by the carrier."

Except for the first report of the Commission in this case, 277 I.C.C. 641, and the first decision in *F. W. Bolgiano & Co., Inc. v. Baltimore & O. R. Co.,* 289 I.C.C. 169, which was made in reliance on the first decision in this case (both of which decisions now stand reversed on reconsideration), the Commission in a long line of decisions has consistently held that where a tariff is published, accepted by it and filed, the tariff names the applicable rates, and shippers are not entitled to damages merely upon showing that in publishing and filing such rates the carriers violated an order of the Commission. *Brown & Sons Lumber Co. v. L. & N. R.R. Co.,* 37 I.C.C. 507; *Traffic Bureau of the Toledo Commerce Club v. Ann Arbor RR Co. et al.,* 45 I.C.C. 527; *Greene Cananea Copper Co. v. Director General,* 80 I.C.C. 121; *Greene Cananea Copper Co. v. C., R.I. & P. Ry Co.,* 88 I.C.C. 225; *Kansas City Fuel Oil Co. v. Atchison, T. & S.F. Ry. Co.,* 210 I.C.C. 134; *Texas Produce Co. v. Illinois Central R. Co.,* 209 I.C.C. 113; *Ralston Purine Co. v. Atlanta, B. & C. R. Co.,* 174 I.C.C. 722; *Dewey Portland Cement Co. v. Atchison, T. & S.F. Ry. Co.,* 185 I.C.C. 233; *Greene Cananea Copper Co. v. Director General,* 102 I.C.C. 473; *Concrete Engineering Co. v. Baltimore*

& O. R. Co., 160 I.C.C. 675; *National Erie Corp. v. New York Central R. Co.*, 237 I.C.C. 4.

The appellees predicate their case on the contention that by the mere showing that the carriers exceeded the authority granted by the Commission in its order in Ex Parte 162 they are entitled to damages. We have already demonstrated that this is not enough. Moreover, there is no evidence from which it could be concluded that the rates the appellees were charged were unreasonable, discriminatory, or otherwise unlawful.

In its initial decision in this case, the Commission did not find that the assailed rates were unreasonably high. In that decision, 277 I.C.C. 641 at page 645, the Commission avoided the issue by holding that the evidence that the rates are reasonable, " * * * misses the crux of the issue * * * " and decided the case on the theory of unjust enrichment.

The Commission in its final decision in this case, after discussing the evidence found,

> "There is no evidence that can be said to afford a sound basis for a finding of unreasonableness." (T. 386)

This finding of the Commission is supported by the evidence, and therefore must be accepted by the court.

In reviewing orders of the Interstate Commerce Commission,

> " * * * the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law *prima facie*

> true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' Illinois C. R. Co. v. Interstate Commerce Commission, 206 U.S. 441, 51 L.ed. 1128, 27 Sup.Ct.Rep. 700. Its conclusion, of course, is subject to review, but, when supported by evidence, is accepted as final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof, but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.''
>
> *Interstate Com. Com. v. Union P. R. Co.,* 222 U.S. 541, 56 L.ed. 308.

See also *Akron C. & Y. R. Co. v. United States,* 261 U.S. 184, 67 L.ed. 605; *Western Paper Makers Chemical Co. v. United States,* 271 U.S. 268, 70 L.ed. 941.

The only evidence the appellees introduced in the proceedings before the Commission bearing on the intrinsic reasonableness of the assailed rates was their Exhibit No. 1. In that Exhibit, the car mile earnings under the level of the rates here contended for by the appellees are compared to the earnings which the carriers would receive on rates published at the lowest possible level the Commission would permit (T. 229). The revenue returned to the carriers on the lowest permitted level of rates is 10 cents per car mile, which the Commission uses as a minimum below which the carriers may not go in publishing rates pursuant to orders issued by the Commission under the Fourth Section of the Act, Title 49 U.S.C. A.9 Sec. 4 (T. 229). The level of rates sought by the appellees would return .1214 cents per car mile (Exhibit 1). Rates that will return but 2

and a fraction cents above the lowest permitted minimum rate certainly are not shown to be unreasonable.

The carriers, on the other hand, with respect to the rates applying from British Columbia to Midwestern Territory, compared the level of the assailed rates which returned the carriers from about 12½ cents per car mile to a high of 21 cents per car mile (Exhibit No. 14), with rates published to apply on fertilizers moving from the same origin group to the same destination (Exhibit No. 15). These fertilizer rates return to the carriers revenue in cents per car mile of a low of 19 cents to a high of 50 cents, most of the rates returning something on the average between 20 and 40 cents per car mile. Had the shippers been charged the fertilizer rates, increased by 6 cents, they would have paid charges substantially higher than those they now assail.

The rail carriers also showed the history of the rates applying from British Columbia to Midwestern Territory (Exhibit No. 12). Commencing in 1936, the carriers, in order to enable the appellees to compete in the Midwestern markets far distant from their points of origin, established extremely low rates (T. 257). In 1940 the reduced basis of rates was published to apply to substantially all of the Middlewest and Eastern Territory on a related basis to the reduced rates published in 1936 (T. 258). The rates which the appellees paid following the 20 per cent increase were substantially lower than what they would have paid had the carriers not given them these sharp reductions in their rates and charged them the fertilizer rates increased by 6 cents.

The favorable rate treatment the appellees received

can be illustrated by examining the rates published to California. Commodity rates on peat were first published from British Columbia to California in 1937. These rates were 80 cents to San Francisco Bay District, and 100 cents to Southern California. They were increased pursuant to authority granted by the Interstate Commerce Commission in Ex Parte 123 to 88 cents and $1.10 respectively. Because of the competition of imported peat from Sweden and Germany, the carriers voluntarily reduced these rates in 1939 to 58 cents to the San Francisco area and 73 cents to Los Angeles,—30-cent reduction in rates to San Francisco and 37-cent reduction in rates to Los Angeles (Exhibit 17, T. 275-277).

Had there been no voluntary reductions in rates, and had the carriers increased the rate in the manner in which the appellees insist should have been done by applying a 6-cent maximum increase as a result of the order in Ex Parte 162, the rate to San Francisco would have become 94 cents and the rate to Los Angeles $1.16. The rates they assail as being unreasonable, on the other hand, are 70 cents to San Francisco and 86 cents to Los Angeles. Consequently, even with the full 20 per cent increase of the voluntarily reduced rates, the appellees are enjoying rates to San Francisco which are 24 cents per cwt. lower, and to Los Angeles 26 cents per cwt. lower, than rates which the carriers could have maintained had they elected to do so (Exhibit 18, T. 279). The Commission's finding that there is no evidence that can be said to afford a sound basis for a finding of unreasonableness is completely supported by this record.

Since, under the Interstate Commerce Act, the carriers were left with the power to initiate rates, *Skinner & Eddy Corp. v. United States,* 249 U.S. 557, 63 L.ed. 772, if the carriers exceeded the authority granted by the Commission in increasing their rates, this act in and of itself did not damage the appellees. If we assume a violation of the order, all that happened was that these increased rates became effective on 5 days notice rather than the 30 days notice required by Title 29 U.S.C.A. Section 6(3). All that the carriers asked for and obtained in the Ex Parte 162 proceeding was authority to publish an increase in rates on 5 days notice rather than the usual 30-day notice.

The rates which the Commission authorized were not prescribed rates, and if the increases, authorized or unauthorized, resulted in the collection of unreasonable or unlawful charges, nothing prevented any shipper from claiming reparation. This is made clear by the Commission in its finding 15, in Ex Parte 162, 266 I.C.C. 537 at 617, where it made reference to the decision in *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.,* 284 U.S. 370, 76 L.ed. 348. Consequently, the appellees stood in no different position than all the other shippers whose rates were increased.

The Commission, on substantial evidence in this record, found that the charges which the appellees were required to pay were reasonable.

> " * * * the commission may not order or permit payment of damages by way of reparations without finding that the amount of the charge was unjust and unreasonable."
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> *Great Northern R. Co. v. Sullivan,* 294 U.S. 458, 79 L.ed. 992.

Citing *News Syndicate Co. v. New York C. R. Co.*, 275 U.S. 187, 72 L.ed. 228.

These appellees have been required to pay nothing more than reasonable charges for the service which they received. They were not damaged, and the Commission properly dismissed the complaints.

Specification of Error No. V:

> "The District Court erred in concluding that the Interstate Commerce Commission violated its own rules and as a result thereof denied the appellees due process by granting a second petition of the railroads for reconsideration as more particularly set forth in its order of June 21, 1954. (Conclusion of Law No. IV, T. 35)"

The procedure established by the Commission for filing petitions for reconsideration is set forth in their General Rules of Practice in Rule 101 (See Appendix to Title 49 U.S.C.A. Sections 381 to end, at page 477).[4] There are two parts to that rule which are material here,—Subsections (e) and (f), which read as follows:

> "(e) *Time for filing.* Except for good cause shown, and upon leave granted, petitions under this rule must be filed within 30 days after the date of service of a decision or order granting an application in whole or in part, and within 60 days after the date of service of any other character of decision or order.
>
> "(f) *Successive petitions on same grounds, not entertained.* A successive petition under subdivision (d) of this rule filed by the same party or parties, and upon substantially the same grounds as a former petition, which has been considered and

[4]Since amended but not in a manner here material. See the 1956 Supplement to the cited volume.

denied by the entire Commission, or by an appropriate appellate division, will not be entertained."

It is to be noted that successive petitions on the same grounds will not be entertained, and further, that a petition for reconsideration must be filed within 60 days after date of service of the order which the Commission is asked to reconsider. In order to bring themselves within the requirement of subsection (e), the carriers filed a petition for leave to file petition to reopen and reconsider (T. 369, 370).

As we have earlier pointed out in this brief, it was in the first decision in these proceedings in which the Commission first adopted the rule that where carriers file tariffs with the Commission naming increased rates, if the Commission subsequently finds the increases were not authorized, the Commission should grant reparations, on the theory that in collecting the unauthorized increases the carriers were unjustly enriched. Not only was this the first decision in which such a doctrine was announced, but this decision overruled a long line of authority to the contrary. (See cases cited pages 20-21 of our brief.)

The initial decision in this case was then followed by the decision (*F. W. Bolgiano & Co., Inc. v. Baltimore & O. R. Co.,* 289 I.C.C. 169) which involved the same issues, and in which the Commission, relying on the initial decision in this case, again awarded reparations. As shown by our petition for leave to file a petition (T. 369-370), after the Commission had denied the carriers' first petition for reconsideration, the carriers had elected to require the appellees to sue to enforce the Commission's reparation order. No suit had been

brought; consequently no reparations had been paid when the Commission, on reconsideration, reversed its first decision in the *Bolgiano* case, and rejected the doctrine that reparations under the circumstances here presented should be paid on the theory of unjust enrichment. *F. W. Bolgiano & Co., Inc. v. Baltimore & O. R. Co.,* 291 I.C.C. 659.

In rejecting the doctrine of unjust enrichment in that proceeding, the Commission again adhered to the theretofore long established doctrine that the mere showing of a violation of a Commission order in the publication and filing of increased charges would not in and of itself give rise to damages in the absence of proof that shippers were in fact damaged.

It was this change in circumstance that the carriers relied on in petitioning for leave to file their second petition for reconsideration, and that caused the Commission to accept the second petition for reconsideration and reopen the proceedings (T. 369, 370, 377, 378). The granting of leave to file the second petition for reconsideration was fully justified. The second petition for reconsideration was tendered in strict conformity to the Commission's rules.

The District Court erred when it concluded that the Commission had violated its own rules and denied the appellees due process.

Specification of Error No. VI:

> "The District Court erred in concluding that the plaintiffs are entitled to judgment against the defendants, and each of them directing that the orders heretofore made by the Interstate Com-

merce Commission be reversed, and that these causes be remanded to the Interstate Commerce Commission for the fixing of the amount of reparations due the appellees (plaintiffs below), together with interest thereon, and the entry of a reparations order consistent with the findings of fact, conclusions of law and judgment herein entered (Conclusion of Law No. V, T. 36); and in entering judgment reversing the orders of the Commission here considered and remanding the proceedings to the Commission for the purpose of fixing the amount of reparations due the appellees and the entry of a reparation order consistent with the court's Findings of Fact and Conclusions of Law."

We have shown that the Commission correctly concluded that the appellees have failed to show that they were damaged by any action of the defendants; that the rates which the appellees were charged by the defendants were the applicable rates, and were reasonable and lawful; that the Commission has conducted these proceedings in conformity to its rules, and has afforded the appellees due process of law.

VI. CONCLUSION

The orders of the Commission dismissing the complaints should be affirmed. The judgment of the District Court should be reversed and set aside, with instructions to enter judgment dismissing the case.

Respectfully submitted,

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